86-421

No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BOARD OF DIRECTORS OF ROTARY INTERNATIONAL, et al.,

Appellants,

v.

ROTARY CLUB OF DUARTE, et al.,

Appellees.

Appeal from the Court of Appeal of the State of California, Second Appellate District

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

This appeal presents the following questions under the United States Constitution:

Does the decision of the California Court of Appeal, construing the Unruh Civil Rights Act, Cal. Civ. Code § 51, to require the admission of females to all-male local Rotary clubs, unconstitutionally infringe upon the First Amendment associational rights of the members of such clubs, where there is an average membership of 46, selective membership requirements, an official and genuine policy of discouraging the use of membership for commercial gain, and a principal purpose of promoting fellowship for the non-commercial and non-economic objectives of securing the voluntary, uncompensated participation of business and professional men in a variety of civic, eleemosynary and charitable service activities?

Is the Unruh Act, construed by the California Court of Appeal as applicable to such clubs, unconstitutionally vague and overbroad as an instrument for regulating memberships protected by First Amendment freedom of association?

PARTIES

Pursuant to the Supreme Court Rules 12 and 15, the appellants file this, their statement of the bases on which they contend that the Supreme Court of the United States has appellate jurisdiction to review the judgment appealed from herein. Appellants are Board of Directors of Rotary International and Rotary District 530. Appellees are Rotary Club of Duarte, Mary Lou Elliott and Rosemary Freitag.[1]

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[1] In accordance with the Supreme Court Rule 28.1 counsel states that Rotary International may be considered the "parent" of Rotary District 530, Rotary Club of Duarte, and all other Rotary Districts and local Rotary clubs. Further, in accordance with Supreme Court Rule 28.4(c), appellants note that the constitutionality of a California statute is drawn in question in this case, and neither the State nor any agency, officer, or employee thereof is a party. Consequently, 28 U.S.C. § 2403(b) may be applicable, and this Jurisdictional Statement has been served upon the Attorney General of California.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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OPINIONS BELOW

The Memorandum of Decision of the Superior Court of the State of California for the County of Los Angeles was issued on January 28, 1983. It is not reported but is printed as Appendix A. The Statement of Decision of that court was filed on March 21, 1983 and is also unreported but is printed as Appendix B. The opinion of the Court of Appeal was filed on March 17, 1986 and modified on April 9, 1986. It appears in 178 Cal.App. 3d 1051 (1986), and is printed as Appendix C. The California Supreme Court issued its order

denying appellants' petition for review on June 18, 1986. Said order is printed as Appendix D.

JURISDICTIONAL GROUNDS

The Notice of Appeal was filed in the Court of Appeal on July 15, 1986. A copy thereof is printed as Appendix E. The time within which to docket this appeal expires on September 16, 1986, and timely docketing has been made. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2) and 28 U.S.C. § 2101(c). Appellants squarely challenged the constitutionality of the Unruh Act, if construed to require the admission of females to local Rotary clubs, and the California Court of Appeal squarely sustained its validity, as so construed. The California Supreme Court declined to review the decision of the Court of Appeal.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the constitutionality of the California Unruh Civil Rights Act under the First and Fourteenth Amendments to the United States Constitution. [App. H]

The Unruh Act, Cal. Civ. Code § 51, provides in pertinent part:

> All persons within the jurisdiction of this State are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accomodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

In addition, the pertinent provisions of California Civil Code § 52 are as follows:

> Whoever denies, or who aids, or incites such denial, or whoever makes any discrimination, distinction or restriction on account of sex, color, race, religion, ancestry, or national origin contrary to the provisions of Section 51 . . . is liable for each and every such offense for the actual damages, and such amount as may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage but in no case less than two hundred fifty dollars ($250), and such attorney's fees as may be determined by the court in addition thereto, suffered by any person denied the rights provided in Section 51 . . .

STATEMENT OF THE CASE

Rotary International is a worldwide association of local Rotary clubs. An individual Rotarian is a member of a local club, not of Rotary International; all local clubs are members of Rotary International. [Rotary Basic Library, Focus on Rotary, vol. 1, p. 1][2]

Membership in Rotary is restricted to business and professional men, is by invitation only, and is highly selective. [Rotary Basic Library, Focus on Rotary, vol. 1, pp. 1-2; App. B-4]

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[2]The 1981 edition of Rotary's Manual of Procedure and the seven volume Rotary Basic Library were exhibits to the deposition of Herbert A. Pigman, General Secretary of Rotary International. Mr. Pigman's deposition and these documents were admitted into evidence pursuant to a written Stipulation Regarding Certain Undisputed Facts and Related Portions of the Record. The Stipulation and deposition are printed as Appendices F and G. The California Court of Appeal, on its own motion, augmented the record on appeal to include the 1981 Manual of Procedure and the Rotary Basic Library, both of which are cited from time to time herein.

The primary purpose of Rotary is to encourage a fellowship among business and professional men representing a diverse cross-section of the local community. Associational congeniality among Rotarians is of major importance. [App. B-3]

In 1977 the Rotary Club of Duarte (Duarte) admitted Donna Bogart, Mary Lou Elliott and Rosemary Freitag as active regular members in contravention of the Constitution and By-Laws of Rotary International. [App. C-7] After full compliance with its notice and hearing requirements, Rotary International, acting through its Board of Directors, revoked Duarte's charter and terminated its membership. [App. C-8] On January 8, 1979, Duarte and two of the three women, Elliott and Freitag, filed an amended complaint for injunctive and declaratory relief against the Board of Directors of Rotary International, Rotary District 530 and the district governors of District 530 for the fiscal years 1977-1978 and 1978-1979. The two individual defendants were later dismissed.

In their amended complaint, plaintiffs sought (1) to enjoin the defendants from declaring Duarte's charter null and void, from compelling delivery of the charter to any representative of Rotary International, and from enforcing those provisions of Rotary International's Constitution and By-Laws restricting membership in local clubs to males and (2) a declaration that the acts of defendants violated the Unruh Act.[3]

The matter was tried before the trial court without a jury, defendants asserting, among other defenses, that to require

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[3] Plaintiffs also alleged a violation of Article 1, section 8 of the California Constitution. The trial court held that this constitutional provision requires state action and was inapplicable. The Court of Appeal did not rule on this issue.

local Rotary clubs to admit females would violate their associational rights under the First and Fourteenth Amendments to the United States Constitution. The trial court entered judgment in favor of defendants, finding that Duarte, Rotary International and District 530 were not "business establishments" within the meaning of the Unruh Act, and that they were not organizations providing "goods, services and facilities" to their members. It further found that to preclude enforcement of Rotary's male-only policy would unconstitutionally infringe the associational rights of many Rotarians and "would materially affect the operation of Rotary not merely outside the State of California but outside the United States." The trial court also found that plaintiffs had not proven that enforcement of the male-only policy and expulsion of Duarte from Rotary International had caused any damage to Duarte or to the individual plaintiffs or women in general.

The Court of Appeal reversed, finding that both Duarte and Rotary International were business establishments within the meaning of the Unruh Act. The Court of Appeal held that, as business establishments, Duarte and Rotary International were guilty of "arbitrary" sex discrimination, and that to enforce the Unruh Act against them did not violate the First and Fourteenth Amendments. It ordered reinstatement of Duarte as a member of Rotary International and a permanent injunction against enforcement of the male-only membership restriction against Duarte. The California Supreme Court denied a petition to review the decision of the Court of Appeal.

REASONS WHY QUESTIONS PRESENTED ARE SUBSTANTIAL

The California Unruh Civil Rights Act generally requires free public access to all business establishments. However,

the California Court of Appeal has applied that Act, which prohibits any form of "arbitrary" discrimination in the provision of goods and services to the public, to preempt and govern the membership policies of a local Rotary club. This holding places in grave doubt the rights of a broad range of selective membership organizations to determine and apply *any* standards for membership, including those specific standards which provide unifying principles of affiliation. If allowed to stand, this decision will severely inhibit the exercise of associational freedom, not only in California, but throughout the Land.

I. UNIQUE CHARACTERISTICS OF ROTARY DISTINGUISH IT FROM THE JAYCEES AND NECESSITATE SUPREME COURT CLARIFICATION OF THE BREADTH OF CONSTITUTIONALLY PROTECTED FREEDOM OF ASSOCIATION

A. Rotary Is a Service Organization, Selective in Its Membership, Which Does Not Treat Its Members as Customers, Which Lacks Commercial Motivation, in Which Fellowship Is a Significant Aspect of Membership, and Which Has Well-Defined Policies Restricting Participation to Members; It Is Entitled to Freedom of Intimate Association

In *Roberts* v. *United States Jaycees*, 468 U.S. 609 (1984), this Court reaffirmed its previous decisions upholding constitutionally protected freedom of association in two senses: freedom of intimate association and freedom of expressive association. It specifically recognized that the greatest protection must be accorded to freedom of intimate association in order to secure individual liberty.

> . . . we have noted that certain kinds of personal bonds have played a critical role in the culture and traditions

> of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State . . . *See also Gilmore* v. *City of Montgomery*, 417 U.S. 556, 575 (1974) . . . [468 U.S. at 618-619]

The referenced citation is to the majority opinion striking down an ordinance excluding all-white groups from public facilities. Quoting the famous dissent of Justice Douglas in *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972), Justice Blackmun said:

> "The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires." 407 U.S., at 179-180. The freedom to associate applies to the beliefs we share, and to those we consider reprehensible. It tends to produce the diversity of opinion that oils the machinery of democratic government and insures peaceful, orderly change. [*Gilmore* v. *City of Montgomery*, 417 U.S. at 575]

At the same time, this Court, in *Roberts*, held that only relationships with the qualities of "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship . . . are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty." [468 U.S. at 620] The Court cited the concurring opinion of Justice Powell in *Runyon* v. *McCrary*, 427 U.S. 160, 187-189 (1976), in which he stressed that it is not easy to draw a "bright line" between private, personal associations and those in which

"[t]here was no plan or purpose of exclusiveness." He noted that a "gray area necessarily exists in between" protected selective associations and commercial enterprises.

This case affords the Court an excellent opportunity to narrow and lighten such "gray area." *Roberts* involved an organization (the Jaycees) which regarded its "members more as customers than as owners," and which sold a product to the general public. "The product being sold is membership in an organization whose aim is the [commercial] advancement of its members." *United States Jaycees* v. *McClure*, 305 N.W.2d 764, 769 (Minn. 1981). If an organization, such as the Jaycees, is engaged in "unselective, vigorous sale of memberships, the national organization is engaged in a *public* business." *Id.* at 771 (emphasis in original). Additionally, if an organization, like the Jaycees, invites women or other non-members to share the group's views and philosophy and to participate in much of its training and community activities, its claim of right to exclude females or any other broad class of persons from membership on freedom-of-association grounds is substantially impaired.

On the other hand, a service organization, selective in its membership, which does not treat its members as customers, which exists, not to deliver services to its members, but to cause its members to render service to the public, which lacks commercial motivation, in which fellowship is a significant aspect of membership, and which has well-defined policies restricting participation in its activities to members, should be held to fall on the protected side of the "line."

In the instant case, applying these fundamental constitutional principles, and guided by the Minnesota Supreme Court's decision in the Jaycees case, the trial court made

findings of fact, supported by substantial evidence, which distinguished that case and balanced the equities in favor of Rotary. Under California law such findings are entitled to precedence over contrary resolutions of conflicting evidence made by an appellate court.[4]

Rotary International is a worldwide association of local Rotary clubs. In August 1982 there were 19,788 local clubs

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[4] Where a claim is made that a decision of a state court violates First and Fourteenth Amendment rights, this Court will make an independent review of the facts found by the state court. *See generally Jacobellis* v. *State of Ohio*, 378 U.S. 184 (1964); *Connick* v. *Myers*, 461 U.S. 138, 150 n. 10 (1983), and cases cited therein. In making such independent review, the following elements of California appellate law should be borne in mind:

(a) When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination whether there is *any* substantial evidence *contradicted or uncontradicted* which will support the finding of fact. *Primm* v. *Primm*, 46 Cal.2d 690, 693, 299 P.2d 231 (1956); *Estate of Bristol*, 23 Cal.2d 221, 223-224, 143 P.2d 698 (1943); *Foreman & Clark Corp.* v. *Fallon*, 3 Cal.3d 875, 881, 479 P.2d 362 (1971); *Neel* v. *Farmer's Insurance Exchange*, 21 Cal.3d 910, 922, 585 P.2d 980 (1978); *Estate of Leslie*, 37 Cal.3d 186, 689 P.2d 133 (1984).

(b) A reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact. *Foreman & Clark Corp.* v. *Fallon*, 3 Cal.3d at 881.

(c) In applying the substantial evidence rule, an appellate court looks only at the evidence supporting the successful party and disregards the contrary showing. *Day* v. *Rosenthal*, 170 Cal.App.3d 1125 (1985).

(d) Unless appellant's brief sets forth all the evidence (not merely favorable evidence), any objections to the evidentiary support of the trial court's findings are waived. *Franck* v. *Polaris*

in 157 different countries with a total membership of approximately 907,750. [App. C-5] Thus, the average membership of a local club was 46. Duarte had a membership of 21 at the time its charter was withdrawn.

Membership in Rotary is restricted to males and is by invitation only. [Rotary Basic Library, Focus on Rotary, vol. 1, pp. 1-2; App. B-4] Rotary does not permit the use of its name by women's clubs, nor may such clubs become members of Rotary International and participate in its conventions and other forms of administration. [1981 Manual of Procedure, pp. 155-156]

Rotary is highly selective in its membership. [App. B-4] Rotary membership is neither solicited from nor is it available to the public generally. [App. B-5] Membership is always personal; it does not represent a company membership. [Pigman deposition, App. G-16] Each local Rotary

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E-Z Go Div. of Textron, Inc., 157 Cal.App.3d 1107 (1984); *Foreman & Clark Corp.* v. *Fallon*, 3 Cal.3d at 881.

(e) An appellate court has limited power to substitute its discretion for that of a trial court in injunctive proceedings. *Union Interchange, Inc.* v. *Savage*, 52 Cal.2d 601, 90 P.2d 327 (1959); *Family Record Plan, Inc.* v. *Mitchell*, 172 Cal.App.2d 235, 342 P.2d 10 (1959).

The Court of Appeal's pervasive challenges to the presumption of validity that attaches to trial court findings not only violate California appellate law, they also constitute a classic example of what this Court has deemed a "fundamental error" in First Amendment cases—misplacing the burden of proof to require the party exercising a First Amendment right to justify (by a showing of substantial evidence) the particular manner in which such freedom is exercised. *See Healy* v. *James*, 408 U.S. 169, 183-185 (1972). California has enunciated a similar First Amendment "presumption of immunity" from state regulation. *Britt* v. *Superior Court*, 20 Cal.3d 844, 574 P.2d 766 (1978).

club seeks its members from the business and professional leaders within a clearly-defined geographical community approximating a single municipality in size. There is generally only one local Rotary club in any given geographical community. [App. B-2; 1981 Manual of Procedure, p. 205] Each Rotary club is governed by an elected board of directors. [Rotary Basic Library, Focus on Rotary, vol. 1, p. 70]

Rotary imposes a "classification" system limiting the number of members in a local club from any single line of business or profession. [App. B-4; Rotary Basic Library, Focus on Rotary, vol. 1, pp. 2, 67, Club Service, vol. 2, p. 7]

Rotary International has adopted Recommended Club By-Laws for local clubs which set forth the procedures for admission of new members. The name of a candidate for admission must be proposed to the local club by the membership committee or by an active, senior active, or past service member. The sponsor submits the candidate's name to the club's board of directors on a membership proposal card. The board sends the card to the classifications committee and the membership committee. The former makes sure that there is an open classification of business or profession and that the prospective member's business or profession is accurately described by that classification. The latter evaluates the candidate from the standpoint of character, business and social standing, and general eligibility. To avoid embarrassment, the candidate's name is kept confidential throughout this preliminary procedure and the candidate himself is not told of these investigations.

If the reports of both committees are favorable and the board approves them, the candidate's name, business and classification are published to the members. If there is no written objection received by the board within 10 days, the candidate becomes a member. If there is such an objection,

membership requires a further approving vote by the board. [Rotary Basic Library, Club Service, vol. 2, pp. 29-32]

An active member must work in a leadership capacity (owner, partner, manager, *et al.*) in the business or profession in which he is classified and must work or live within the club's territory. [Rotary Basic Library, Club Service, vol. 2, p. 32] There is no provision by which a member of a Rotary club may transfer his membership from one club to another. [1981 Manual of Procedure, p. 135]

The primary purpose of Rotary is to encourage a fellowship among business and professional men. In addition to the encouragement of fellowship for its own intrinsic merit, Rotary uses that fellowship to promote a variety of voluntary, civic, eleemosynary, and charitable "service" activities undertaken by the local clubs with the guidance and assistance of Rotary International. [Pigman deposition, App. G-23, G-26; App. B-3] To ensure that the undivided interest and energy of Rotarians are addressed to Rotary's membership obligations, Rotarians are urged not to belong to other service clubs. [1981 Manual of Procedure, p. 135]

Rotary's "male-only" policy had its origin many years ago in the quality of fellowship desired by Rotary's founders. However, as Rotary grew nationally and internationally, that membership policy grew into a fundamental and broadly accepted principle of Rotarian operation, cherished not only for the quality of fellowship which it provided, but also to a material extent because of the demonstrated fact that, as a "male-only" organization, Rotary has been able to operate effectively over a worldwide base of varied cultures and social mores. [Pigman deposition, App. G-50—G-53; App. B-5—B-6]

For many years the official and genuine policy of Rotary International has been to discourage the seeking or giving of

preferential business among Rotarians or the use of Rotary club membership for commercial gain. The 1981 Manual of Procedure specifically provides: "Any use of the fellowship of Rotary as a means of gaining an advantage or profit is foreign to the spirit of Rotary." [Pigman deposition, App. G-34—G-37; App. B-3; Rotary Basic Library, Focus on Rotary, vol. 1, pp. 2, 68; 1981 Manual of Procedure, p. 154] This policy dates from at least as early as 1934. [Pigman deposition, App. G-36]

The importance of associational congeniality among Rotarians is substantial. Demanding and strictly enforced standards for attendance at weekly meetings result in an average worldwide attendance of 80 percent. [Pigman deposition, App. G-22—G-23; App. B-3] Meetings are not open to the public. [Pigman deposition, App. G-25] The Rotary club is intended to be really a *club*—a body of men who are knit together in bonds of personal friendship and service. [Rotary Basic Library, Focus on Rotary, vol. 1, pp. 67-68]

In *United States Jaycees* v. *McClure,* 305 N.W.2d 764 (Minn. 1981), the Minnesota Supreme Court held that the Jaycees could not properly exclude women from membership because it was a "public" as opposed to a "private" organization, such as Kiwanis International. This Court agreed with the distinction:

> . . . we read the illustrative reference to the Kiwanis Club, *which the record indicates has a formal procedure for choosing members on the basis of specific and selective criteria,* as simply providing a further refinement of the standards used to determine whether an organization is "public" or "private." [*Roberts,* 468 U.S. at 630][emphasis added]

Significantly, Rotary shares many of the key characteristics of Kiwanis, as enunciated in *Kiwanis Club of Great Neck* v. *Board of Trustees of Kiwanis International,* 374

N.Y.S.2d 265 (1975). Like Kiwanis, Rotary is a service organization the objectives of which have no commercial implications. Also like Kiwanis, it has selective standards for the admission of members and a plan for screening prospective members. Each local club is run by a board elected by the members. It meets the standards and criteria of a private club.

In affirming the trial court decision holding that women need not be admitted to Kiwanis, the New York Court of Appeals agreed with the characterization of Kiwanis as a private organization and added:

> Although the Kiwanis Clubs' community-oriented activities may extend into the public sphere, the intrusion indicated on this record is not so extensive, or of the quality, as to permit governmental supervision of essentially private activity in the constitutional sense. [41 N.Y.2d 1034 (1977)]

The trial court here found that Rotary is quite unlike the Jaycees but that there is "substantial similarity" between Rotary and Kiwanis. [App. B-9, B-11—B-12] It held that Rotary is fully entitled to claim constitutional protection for its freedom of association. The Court of Appeal, however, held that membership in personal, social, private organizations is governed by anti-discrimination laws. Faced with uncontradicted evidence that the average local Rotary club, the only Rotary organization to which an individual Rotarian belongs, has only 46 members, that the average attendance at weekly meetings is 80%, that selective membership criteria are strictly adhered to, and that fellowship in service is the principal purpose of Rotary, the Court of Appeal stressed the large number of local Rotary clubs which make up Rotary International and held that "membership in International" is far from "continuous, personal and social." [App. C-27] Actually, of course, there is no individual

membership in Rotary International. Rotary International is only an association of small, local and "truly private" Rotary clubs.

With respect to such local clubs, the Court of Appeal, in direct opposition to the position of the New York Court of Appeals in the *Kiwanis* case, found it significant that "the community services performed by local Rotarians clearly take place in 'public view.' " [App. C-28] The court failed to see the vital difference between closely-knit members of a private organization rendering public service out of a sense of dedication and the sale of services to the public by a public business. [Pigman deposition, App. G-33—G-34, G-45]

The Court of Appeal further held that "[s]ubstantial business benefits regardless of whether they are of a primary or secondary concern must be considered . . . ." [App. C-23] While it accepted as factual that "[t]oday, official policy promulgated by International through its Board 'specifically prohibits any attempt to use the privilege of membership for commercial advantage,' " the Court of Appeal asserted that this does not mean "that commercial advantages and business benefits have in actuality ceased to flow from Rotary membership." [App. C-24]

However, the court did not refer to the admission of the two female plaintiffs that they did not join the Rotary Club of Duarte for the purpose of promoting their business and professional careers, nor did they feel that they had been impeded in their pursuit of any such careers by any actions of Rotary International. [Stipulation, App. F-4]

Moreover, the fact that incidental business benefits accrue to the members of many, if not most, truly private associations is and must be irrelevant to such associations' constitutional right to freedom of association. Take, for

example, a hypothetical poker club comprised of seven male executives of seven major corporations. Can anyone seriously contend that a state statute could constitutionally compel such a club to admit a female executive simply because, in addition to the fellowship enjoyed by the members over their weekly game and the exchange of "smoking room" stories, business relationships are fostered and business benefits enjoyed? Business relationships are a natural, not an unusual, outgrowth of friendship. Yet the Court of Appeal was able to disregard "personal and social interaction" because of the "commercial aspects of the relationship."

Confronted directly with the standards set forth by this Court in *Roberts*, the Court of Appeal stated:

> While the membership criteria set forth by International and by which local clubs must abide is *selective*, the immense size of International and the number of Rotarians throughout the world is hardly indicative of an intimate relationship. Moreover, while *fellowship and service to the community play a very important part* in the Rotary organization, the business benefits and commercial advantages to be gained are also clearly an inducement for the business and professional leaders of the community to join. [App. C-35—C-36] [emphasis added]

Selectivity, fellowship and service were held to be insufficient to show that Rotary clubs possess the "distinctive characteristics" to entitle them to claim freedom of intimate association. Following appellants' filing of a petition for rehearing which it denied, the Court of Appeal deleted the first sentence quoted above and stated that the classification principle only appears to be selective, because its purpose is "to produce an 'inclusive', not 'exclusive' membership." [App. C-2]

Whether one regards membership criteria which restrict membership to a single member of each categorized business and profession—and that member to a "leader"—as "inclusive" or "exclusive," it can hardly be denied that such criteria are extremely "selective."

Significantly, the Court of Appeal omitted any mention of the other selective criteria of Rotary membership, i.e., potential members being screened "for the integrity of their reputation in the business community, for their dedication to the 'service' objectives of Rotary, and for their willingness and ability to abide by the rigorous attendance and participation standards of Rotary." [App. B-4—B-5]

The standards employed by the Court of Appeal in deciding the issue of freedom of intimate association are clearly erroneous. Furthermore, they are in direct conflict with the holding of the New York Court of Appeals in *Kiwanis Club of Great Neck* v. *Board of Trustees of Kiwanis International,* 41 N.Y.2d 1034 (1977). This Court should accept jurisdiction of this appeal and order briefs on the merits and oral argument.

B. Rotary Is Not Engaged in The Distribution of Publicly Available Goods and Services; No Compelling Reason Exists to Eliminate Its Male-Only Membership and Deprive It of Freedom of Expressive Association to Its Severe and Irreparable Harm

In *Roberts,* this Court also reaffirmed the fundamental First Amendment right of freedom of expressive association:

> According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority. See, *e.g. Gilmore* v. *City of Montgomery,* 417 U.S., at 575; *Griswold* v. *Connecticut,* 381 U.S., at 482-485; *NAACP*

> v. *Button*, 371 U.S. 415, 431 (1963); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S., at 461. (sic) [468 U.S. at 622]

The first cited case involved a number of all-white groups seeking to use a public park from which they had been barred. No showing was made that such groups constituted "truly private clubs," yet their associational rights were protected.

Similarly, the NAACP is assuredly not a "private club." Its membership criteria are substantially less selective than those of Rotary. Its constitution provides that "any person who is in accordance with its principles and policies . . . may become a member." *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958). Membership was shown to be aggressively solicited through an interstate network of regional and local affiliates and the organization was required to register as a business. *Id.* at 451-452. Its objectives were substantially commercial, i.e., ". . . to advance the interests of colored citizens . . . and to increase their opportunities for . . . employment . . ." *Id.* at 451 n.1. Nevertheless, the Court held that such a large organization, broadly open to the public, is entitled to constitutional protection of its freedom of association.

Moreover, advancement of the financial benefit of members of an association is an associational right which cannot be abridged. *United Mine Workers of America, District 12* v. *Illinois State Bar Association*, 389 U.S. 217 (1967).

For First Amendment purposes, the question is not whether a group which asserts the right to freedom of expressive association is a "private club," but whether genuine associational purposes of the group exist and require constitutional protection.

In *Roberts*, the Court upheld a Minnesota statute "eliminating discrimination and assuring its citizens equal access to publicly available goods and services," as applied to the Jaycees. In reaching this conclusion the Court was governed by its finding that the Jaycees organization was engaged in offering "goods," "privileges" and "advantages" to the general public, but excluding women.

> . . . The Minnesota court noted the various commercial programs and benefits offered to members and stated that "[l]eadership skills are 'goods,' [and] business contracts and employment promotions are 'privileges' and 'advantages' . . ." 305 N.W.2d, at 772. Assuring women equal access to such goods, privileges, and advantages clearly furthers compelling state interests. [468 U.S. at 626]

> . . . acts of invidious discrimination in the distribution of *publicly available* goods, services, and other advantages cause *unique evils* that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit. Accordingly, like violence or other types of potentially expressive activities that produce *special harms distinct from their communicative impact*, such practices are entitled to no constitutional protection. [468 U.S. at 628] [emphasis added]

The differences between Rotary and the Jaycees, discussed at length above, are controlling here. The Jaycees was a commercial organization with incidental associational activities. Rotary is not. Rotary is not engaged "in the distribution of publicly available goods, services, and other advantages." Rotary is not "an organization engaged in providing goods, services, and facilities to its members as clients, patrons, or customers" [App. B-9]; its membership "is neither solicited from nor is it available to the public generally." [App. B-5] Its business benefits are limited to

its members and are incidental. Rotary members do not receive services; they render service. [Pigman deposition, App. G-33—G-34, G-45] Indeed, even the California Court of Appeal was compelled to recognize that Rotary is not "truly public." In defending its reading of the Unruh Act as requiring Rotary to admit women to membership in local Rotary clubs, that court said:

> It [the Unruh Act] does not require International to change its objectives or to open membership to the entire *public at large*, nor does it invalidate its "inclusive, not exclusive," *selective* membership requirements. [App. C-2] [emphasis added]

Evidently, the Court of Appeal accepted as facts (i) that Rotary is not open to the public, and (ii) that it has selective membership requirements. Further, it evidently believed that neither of such facts causes "unique evils" which California has a compelling interest to prevent. *Only Rotary's failure to admit women was condemned.* But since Rotary is not a commercial organization engaged in distribution of "publicly available goods, services and other advantages," its conduct cannot be said to have produced "special harms" which would justify overriding its otherwise protected freedom of expressive association in this regard. *Roberts,* 468 U.S. at 628.

In *Roberts,* not only did the Court find a compelling state interest in preventing invidious discrimination in the distribution of publicly available goods and services, it held that admission of women would not impair the Jaycees' expressive associational rights, because there was "no basis in the record for concluding that admission of women as full voting members will impede the organization's ability to engage in these protected activities or to disseminate its preferred views." The Court noted that nonmembers regularly participated in activities of the Jaycees, and that women were

invited to participate in much of its training and community activities.

Here, on the other hand, meetings are not open to the public [Pigman deposition, App. G-25]; joint meetings with other service clubs are opposed [1981 Manual of Procedure, p. 36]; Rotarians are discouraged from joining other service clubs [1981 Manual of Procedure, p. 135]; and women have no place in the Rotary organization [1981 Manual of Procedure, pp. 155-156]. The trial court expressly found that the admission of women to membership in local California Rotary clubs:

> . . . contrary to the long standing and democratically reaffirmed membership principles of Rotary would comprise a material interference with deeply felt choices of associational preference of many Rotarians. . . .
>
> The Court accepts the testimony herein of Rotary's General Secretary . . . that the continued successful worldwide operation of Rotary is materially dependent on a delicate balance of divergent attitudes in diverse cultures, and that judicial interference with this balance, as reflected by votes in Rotary's Council on Legislation, would risk a material and harmful disruption of the existing cooperative integrity of Rotary International both inside and outside the State of California. [App. B-6—B-7; see Pigman deposition, App. G-46—G-53]

The trial court further held that to require the admission of women to local Rotary clubs "would inflict severe, irreparable and unconscionable harm upon Rotary and the associational rights of its members without commensurate or any substantial resulting economic benefit to women or the public." [App. B-9]

The Court of Appeal agreed that the evidence "supports the trial court's finding that the male-only-membership policy is valued by a substantial majority of Rotarians throughout the world and that, as a rule that has been internally agreed upon, it has enabled the organization to work effectively on a worldwide basis," but concluded that this was not sufficient to support a finding that "the admission of women into the local Rotary Club of Duarte would cause the downfall of the District or International or seriously interfere with Rotary's objective." [App. C-30—C-32] If First Amendment rights are constitutionally protected only when failure to do so would cause the "downfall" of the organization asserting such rights, then the Constitution is a frail reed indeed.

An accepted definition of "invidious" is "tending to cause discontent, animosity or envy." Webster's Collegiate Dictionary (7th Ed.) The aggressive policies of special interest groups such as unions, the NAACP, NOW and numerous others assuredly have caused discontent, animosity, and, where successful, envy, among many Americans. But discrimination in favor of a particular class does not cause such a group to lose First Amendment rights. Quite the contrary. The "intense resentment and opposition of the politically dominant white community" was a major factor perceived by this Court as necessitating protection of the NAACP's associational freedom. *NAACP* v. *Button*, 371 U.S. 415, 435 (1963).

> While, of course, all legitimate organizations are the beneficiaries of these [First and Fourteenth Amendment] protections, they are all the more essential here, where the challenged privacy is that of persons espousing beliefs already unpopular with their neighbors and the deterrent and "chilling" effect on the free exercise of constitutionally enshrined rights of free speech, expression, and association is consequently the more

> immediate and substantial. [*Gibson* v. *Florida Legislative Commission*, 372 U.S 539, 556-557 (1963)]

At the present time, male-only organizations such as Rotary are encountering governmental and social hostility akin to that directed at the NAACP in the 1960's. However, it will not do to assert, as the Court of Appeal does, that because the male versus female discrimination practiced by such organizations is perceived as wicked, it is undeserving of constitutional protection. The First Amendment is both color-blind and gender-blind. Freedom of association is protected whether the group invoking the Constitution is perceived as "good" or "bad." Constitutional liberties are guarded regardless of whose ox is being gored.

> For the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered. [*NAACP* v. *Button*, 371 U.S. 415, 444-445 (1963)]

Rotary, Kiwanis, the Lions, the Soroptimists, the Girl Scouts, the Boy Scouts and the Boys' Clubs of America are all certainly no less entitled to First Amendment protection than the NAACP, the United Mine Workers, and thousands of other selective membership organizations which may be regarded by some court as "invidiously discriminatory."[5]

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[5] It is an interesting commentary on the mind-set of the California courts that decisions in that State have held that neither the Boy Scouts nor the Boys' Clubs are entitled to First Amendment protection against the application of the Unruh Act. Exclusion of a homosexual from a leadership position in the Boy Scouts and exclusion of girls from membership in the Boys' Club of Santa Cruz both were held to be unlawful under that Act.

The decision of the Court of Appeal in the instant case deprives Rotary of its constitutional right to freedom of expressive association. Taken together with the recent California decisions involving the Boy Scouts and the Boys' Club of Santa Cruz, it casts serious doubt on the present-day viability of that vital right. This Court should note probable jurisdiction in this case to permit briefs and oral argument on the merits.

II. THE UNRUH ACT AS CONSTRUED BY CALIFORNIA COURTS IS BOTH VAGUE AND OVERBROAD

The pertinent standard for evaluating unconstitutional vagueness was reiterated in *Roberts*:

> The void-for-vagueness doctrine reflects the principle that "a statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." [468 U.S. at 629][citation omitted]

In other cases, this Court has expanded further on the necessity for the doctrine:

> A vague law impermissibly delegates basic policy matters to . . . judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application . . . where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms', it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful

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Curran v. *Mt. Diablo Council of the Boy Scouts of America*, 147 Cal.App.3d 712 (1983); *Isbister* v. *Boys' Club of Santa Cruz, Inc.*, 40 Cal.3d 72, 707 P.2d 212 (1985).

> zone' . . . than if the boundaries of the forbidden areas were clearly marked. [*Grayned* v. *City of Rockford*, 408 U.S. 104, 108-109 (1972), cited in *Roberts*.]

So important is it that a statute, to be constitutional, must not be vague or overbroad, that its status in such regards may be raised even by one to whom, as applied, it is neither. *Gooding* v. *Wilson*, 405 U.S. 518, 521 (1972).

In light of these principles, let us take a brief look at the Unruh Act and its construction by the California courts. It provides that all persons, regardless of "their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accomodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." While these words do not appear to be vague or overbroad, note that the Unruh Act actually "accords every person an individual right against 'arbitrary' discrimination of any kind, whether or not expressly set forth in the statute." *Isbister* v. *Boys' Club of Santa Cruz*, 40 Cal.3d 72, 86, 707 P.2d 212 (1985); *see also In re Cox*, 3 Cal.3d 205, 474 P.2d 992 (1970). The person of common intelligence must therefore be able to determine not only that specified types of discrimination are bad, but that any other "arbitrary" discrimination is also forbidden.

But what is "arbitrary"? The Court, in *Cox*, held that "this broad interdiction of the act is not absolute; [an organization] may establish *reasonable* regulations that are rationally related to the services performed and facilities provided." *Id.* at 212.

Thus, it is permissible for housing to exclude all but the elderly. On the other hand, it is unreasonable to exclude children from a rental facility lacking facilities for children. *Marina Point, Ltd.* v. *Wolfson*, 30 Cal.3d 721, 640 P.2d 115 (1972).

Indeed, it has been held that exclusion of *any* class of persons is *per se* unlawful, so that exclusion of a homosexual from a leadership position in the Boy Scouts cannot be justified:

> Nor can an exclusion be justified only on the ground that the presence of a class of persons does not accord with the nature of the organization or its facilities. [*Curran* v. *Mt. Diablo Council of the Boy Scouts of America*, 147 Cal.App.3d 712, 733 (1983)]

Yet it remains California law that discrimination against the handicapped is not barred by the Unruh Act. *Marsh* v. *Edwards Theatres Circuit, Inc.*, 64 Cal.App.3d 881 (1976).

Were these confusing and apparently contradictory decisions not enough, the California Supreme Court has recently cast doubt on the entire concept of "reasonable regulations that are rationally related to the services performed and facilities provided." *In re Cox*, 3 Cal.3d at 212. In ruling that it is impermissible to restrict membership in a boys' club to boys, even though the purpose of the club is to combat juvenile delinquency, and boys are four times more likely than girls to get into trouble with the law, the court said:

> Nor can we accept Justice Kaus' suggestion that the Club has obeyed the Act because its decision to devote its resources to the greater delinquency problem it perceives among male youth is "rational" and taken in "good faith." *Marina Point* made clear that "reason" and "good faith" are not enough to avoid a finding of "arbitrary" discrimination. [*Isbister* v. *Boys' Club of Santa Cruz, Inc.*, 40 Cal.3d 72, 707 P.2d 212 (1985)]

If a person can determine what forms of discrimination are "arbitrary" under the Unruh Act while at the same time "rational" and in "good faith," or what "reasonable regulations that are rationally related to the services performed

and facilities provided" will be permitted, he or she must indeed be an uncommon person of common intelligence. Note the strong dissents in both *Marina Point* and *Isbister* as evidence that even Supreme Court Justices cannot readily determine what is and is not safe conduct. The problem arises from the concept that, as stated in *Cox*, "all *arbitrary* discrimination" is prohibited by the Act. "Arbitrariness" lies in the eye of the beholder; its use as a litmus test for the propriety or impropriety of otherwise constitutionally protected conduct renders the Unruh Act itself unconstitutional. As well stated by Justice Richardson, dissenting in *Marina*:

> . . . If the issue before us is, as framed by the majority . . . should we approve "wholesale discrimination against children," or the "universal exclusion of children from housing" or sanction "the sacrifice of the well-being of children on the altar of a landlord's profit, or possibly some tenants' convenience," the answer is a thundering "no." We'll choose children over a landlord's profit and greed every time. If, however, the question is put a little differently, and we inquire—do our middle aged or older citizens, having worked long and hard, having raised their own children, having paid both their taxes and their dues to society retain a right to spend their remaining years in a relatively quiet, peaceful and tranquil environment of their choice? The answer to such a question is, why not? [30 Cal. 3d at 745.]

Moreover, the impossibility of determining, in advance, what a California court will countenance and what it will strike down as "arbitrary" is not the end of the matter. The Unruh Act, by its terms, applies only to "business establishments." What, then, is a "business establishment"?

> . . . the term "business establishments," consistent with the Legislature's intent to use the term in the broadest

> sense reasonably possible, includes all commercial and noncommercial entities *open to and serving the general public.* Accordingly, we hold the Boy Scouts, of which the defendant is a part, is a business establishment within the meaning of the Unruh Act. [*Curran* v. *Mt. Diablo Council of the Boy Scouts of America*, 147 Cal.App.3d at 732-733] [emphasis added]

Under *Curran*, rights of free association only "restrain the Legislature from enacting anti-discrimination laws where *strictly* private clubs or institutions are affected." *Id.* at 731. "Since the essence of a private club or organization is exclusivity in the choice of one's associates, we find this approach ensures that private organizations remain protected." *Id.* at 731.

A club will not be regarded as private, however, where "recreational facilities [and membership] are open to the community generally but closed to members of a particular group." *Isbister,* 40 Cal.3d 72, 707 P.2d 212 (1985). In that case, as the dissent by Justice Kaus noted, the excluded "particular group" was everyone except boys from 8 to 18. He caustically commented that, in finding that the club was open to the community at large, the majority must have looked "at the included and excluded groups through different ends of a telescope."

In the instant case, the Court of Appeal concluded that little 21-member Duarte, with the restrictive membership policies of all local Rotary clubs except for its violation of the male-only rule, was a "business establishment," solely because it found that "there are business benefits enjoyed and capitalized upon by Rotarians and their businesses or employers" and that such benefits are not "merely incidental." Gone is any reference to "open to and serving the general public" which was a key element in the definition of "business establishment" in *Curran.* It is an even further cry

from the Court of Appeal decision here to that of the Supreme Court in the earlier case of *Alcorn* v. *Anbro Engineering, Inc.*, 2 Cal.3d 493, 468 P.2d 216 (1970), where the Unruh Act was limited to discrimination by a business establishment "in the course of furnishing goods, services or facilities to its clients, patrons or customers." *Id.* at 500.

In *Roberts,* this Court stressed

> The state court's articulated willingness to adopt limiting constructions that would exclude private groups from the statute's reach, together with the commonly used and sufficiently precise standards it employed to determine that the Jaycees is not such a group, establish that the Act, as currently construed, does not create an unacceptable risk of application to a substantial amount of protected conduct. [468 U.S. at 630-631]

The Unruh Act, as construed by the California courts, lacks even the semblance of "commonly used and sufficiently precise standards" to determine what organizations are subject to the Act, or, even more importantly, what forms of discrimination are barred. The Unruh Act is overbroad and vague as applied to Rotary, and, even if this were not so, it is overbroad and unconstitutional in general application. It provides for treble damages, injunctive relief, and the awarding of attorneys' fees, but provides no protection to parties unjustly accused of its violation. It has a chilling effect upon the First Amendment associational rights of every group in California which is not open to the entire public, and it must be struck down.

CONCLUSION

Groucho Marx well expressed the basic human desire to select one's own associates when he said he would not wish to belong to any club that would admit someone like him.

Unfortunately, to the person excluded, admission frequently appears to offer far greener grass than is available outside—and, indeed, perhaps in some instances it does. But as Justice Douglas has so lucidly stated, the Constitution and the Bill of Rights exist to get "government off the backs of people." *Schneider* v. *Smith,* 390 U.S. 17, 25 (1968). "Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires." *Moose Lodge No. 107,* 407 U.S. at 180; *Gilmore,* 417 U.S. at 575.

For the foregoing reasons, it is earnestly requested that probable jurisdiction be noted.

Respectfully submitted,

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